

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 7, 2006

TO : Martha Kinard, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Cingular Wireless, LLC 506-4033-3000
Case 16-CA-24795 512-5072-2400

The Region seeks advice as to whether the Employer violated Section 8(a)(1) by denying an employee Union representation pursuant to Weingarten, 420 U.S. 251 (1975), during an investigatory interview that included the Employer's physical search of the employee's cell phone.

We conclude that the Employer violated Section 8(a)(1) by refusing the employee's request for a Union representative during that part of its investigatory interview in which the Employer searched the employee's cell phone.

FACTS

Cingular Wireless (Employer) provides wireless voice communication services across the United States and has a long-standing bargaining relationship with CWA, Local 6143 (Union). Employee Sam Rodriguez worked as a retail sales consultant at one of the Employer's San Antonio stores. In mid-June 2005,¹ Rodriguez entered a back office at the store to conduct a manual balance of his cash drawer, at which time he noticed his personnel file, including disciplinary records, on top of a desk. Rodriguez reported this to his Union steward, and was told that nothing could be done at that time. Rodriguez then took pictures of the desk and documents with his camera cell phone. Although Rodriguez owned the handset, the Employer owned the SIM card containing the technology that allowed the phone to operate and take pictures.

In mid-August, two Employer officials, Area Retail Sales Manager Rick Martinez and HR Coordinator Kathryn Ridings, visited Rodriguez's store. They called Rodriguez into the back office, where Martinez told Rodriguez that they were investigating a possible security breach and asked to see Rodriguez's cell phone.² Rodriguez stated that

¹ All dates are in 2005.

he needed Union representation if what Martinez was about to do could lead to disciplinary action. Martinez replied that Union involvement was unnecessary, and that Rodriguez was overreacting and need not worry. Rodriguez asked Martinez again whether what he was about to do could lead to discipline. Martinez stated that disciplinary action could result and Rodriguez reiterated his request for Union representation. Martinez told Rodriguez that if he did not hand over his cell phone, he would be discharged for insubordination. Rodriguez said Martinez's actions were illegal, that he was being denied his right to representation, and pointed to a poster on the Union bulletin board regarding employee rights to Union representation. Martinez again told Rodriguez that he would be terminated for insubordination if he did not give him the phone. Rodriguez handed the phone over, and Martinez proceeded to search the phone. Martinez showed the phone to Ridings and they discussed whether to contact another Human Resources manager regarding the pictures found on the phone. During this search, Rodriguez used another phone to call for Union representation.

After the search of the phone was complete, Martinez told Rodriguez to contact the Union for representation. The Union representatives arrived in about an hour and met with Rodriguez, Martinez, and Ridings. During the meeting, Martinez advised that they received a security report involving Rodriguez's cell phone. The search of the cell phone established that the pictures on Rodriguez's cell phone apparently contained some customer information and/or internal company documents. The parties discussed the contents of the cell phone and Martinez advised that he would let the Employer's legal department decide how to handle the matter. Rodriguez was allowed to return to work after the meeting. Later that day, Rodriguez was suspended pending investigation. On August 24, he was discharged.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by refusing Rodriguez's request for a Union representative during that portion of its investigation when it searched Rodriguez's cell phone.

² Rodriguez states that a day or so earlier, a co-worker of his had, without his permission, viewed the pictures on his phone.

In Weingarten,³ the Supreme Court upheld the Board's decision that an employer violates Section 8(a)(1) by insisting that an employee attend an interview that the employee reasonably believes could result in disciplinary action without the presence of a union representative requested by the employee. In order to secure the right to consult a union representative, the employee must request union representation and must reasonably believe that the investigation will result in disciplinary action.⁴ After a valid request for union representation at an investigatory interview, the employer may grant the request, discontinue the interview, or give the employee the option to continue with no witness or to end the interview.⁵

The Court noted both that an employees' exercise of his/her Weingarten right may not interfere with legitimate employer prerogatives,⁶ and that the presence of the union representative serves to provide assistance and counsel to the employee being investigated, and may indeed save the employer time by getting to the bottom of the incident that led to the interview.⁷ In this regard, although the employer has no duty to bargain with the designated union representative,⁸ it cannot relegate the representative to the role of a mere silent observer.⁹

In the instant case, Rodriguez had a reasonable belief that Martinez's investigation regarding his cell phone could lead to discipline, and therefore made several requests for Union representation. Indeed, Martinez responded to Rodriguez's repeated inquiries by ultimately conceding that discipline could result from a review of the cell phone, and warned Rodriguez that discharge for insubordination could result if he failed to turn over his phone.

³ 420 U.S. 251 (1975).

⁴ 420 U.S. at 257.

⁵ See e.g., Montgomery Ward & Co., 254 NLRB 826, 831 (1981), enfd. in rel. part 664 F.2d 1095 (8th Cir. 1981).

⁶ 420 U.S. at 258.

⁷ Id. at 262-63.

⁸ Id. at 259.

⁹ See Barnard College, 340 NLRB 934, 935 (2003) (Section 8(a)(1) violation for restricting union representative's role to that of observer and preventing him from speaking).

Although Rodriguez had Union representation when Martinez and Ridings were discussing the contents of the phone during the latter part of the Employer's investigation, we conclude that the Employer violated Section 8(a)(1) by refusing to allow him representation during the cell phone search itself. In this regard, we agree with the Region that the search of Rodriguez's cell phone was part of a larger investigation into his conduct. Therefore, this case is controlled by the rationale of the Board's decision in Safeway Stores.¹⁰ In Safeway, an employee was suspended for refusing to take a drug test as part of the employer's investigation into the employee's absenteeism record.¹¹ The employee, who had a history of drug-related disciplinary actions, requested union representation after being told of the reason for the drug test and after protesting that his absences were due to a medical condition.¹² The employee was denied representation and suspended for refusing to take the test.¹³

The Board found that the employer violated Section 8(a)(1) by refusing the employee's request for union representation.¹⁴ Specifically, although noting that it was not deciding whether the drug test alone constituted an investigatory interview under Weingarten, the Board held that the drug test was part of a larger inquiry into the employee's absenteeism record.¹⁵ Under this analysis, an employee who is subject to an investigatory interview that could lead to disciplinary action has the right to union representation during all stages of the interview, including those that require no verbal exchange between the employee and employer.

Here, like in Safeway Stores, the Employer's search of Rodriguez's cell phone was part of the larger investigation into the propriety of Rodriguez taking pictures of internal company documents. Therefore, under Safeway Stores, Rodriguez had the right to Union representation during both

¹⁰ 303 NLRB 989 (1991).

¹¹ 303 NLRB at 989.

¹² Id. at 989, 995.

¹³ Id. at 989, 993.

¹⁴ Id. at 989.

¹⁵ Id.

stages of the Employer's investigation - the search of his cell phone as well as the meeting that followed.¹⁶

We agree with the Region that the Board's decision in United States Postal Service¹⁷ is distinguishable from the instant case. There, the Board held that the employer's "fitness for duty" medical examinations were not part of any disciplinary procedure and thus not subject to Weingarten protection.¹⁸ Although the "fitness for duty" exams in Postal Service were often prompted by personnel issues such as excessive absenteeism, significantly the Board found insufficient evidence that they were undertaken in order to form the basis for disciplinary action against employees because of past misconduct.¹⁹ In addition, the Board found that no questions of an investigatory nature were asked, nor did any "confrontation" between employee and employer occur during the exams.²⁰

In contrast, Rodriguez's interrogation began when Martinez referenced the possibility of a security breach and ordered Rodriguez to hand over his phone prior to the actual search.²¹ Furthermore, unlike in Postal Service, the search of Rodriguez's cell phone clearly contemplated possible disciplinary action. As a result, because the actual search of Rodriguez's phone was part of the larger investigation into his suspected photographing company documents, Rodriguez was entitled to Union representation when he requested it, i.e., prior to the search of the phone.

¹⁶ Contrary to the Employer's contention, we conclude that this case is not governed by the Advice memoranda in Chrysler Corp., 1981 WL 26018 (1981) (no Weingarten right for purse search) or E.I. DuPont, 100 LRRM 1633 (1979) (no Weingarten right for car search), since those memoranda issued prior to the Board's decision in Safeway Stores.

¹⁷ 252 NLRB 61 (1980).

¹⁸ 252 NLRB at 61.

¹⁹ Id.

²⁰ Id.

²¹ See, e.g., Titanium Metals Corp., 340 NLRB 766, 766, 771, 774 (2003), order vacated in part on other grounds 392 F.3d 439 (D.C. Cir. 2004) (employee entitled to union representation at point when employer asked employee if he had any employee-sponsored newsletters in his possession and then searched employee's bag).

Finally, the fact that the Employer owned the SIM card necessary for the cell phone's operation does not negate Rodriguez's right to Union representation during the search. Our conclusion in no way interferes with whatever property interest the Employer may have in the phone. In this regard, we do not conclude that the Employer had no right to search the phone, but rather that there was no need for immediate action and the Employer had only to briefly postpone the full investigation by waiting for Rodriguez's Union representatives to arrive at the store before beginning the search. We note that those representatives arrived only an hour after they were called. In all these circumstances, we do not conclude that Rodriguez's right to Union representation during the search interfered with legitimate employer prerogatives.²²

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by refusing Rodriguez's request for Union representation during its search of his cell phone.

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²² See Weingarten, 420 U.S. at 258.